"That is the golden thread and it is a source of satisfaction to be able to conclude that in this country we are not compelled to reduce the fineness of that gold."

The most recent pronouncement on this very point is that of Azmi C.J. in *Wong Chooi* v. *Public Prosecutor*:—(15)

"In my view the law is quite clear, that where a burden is placed on an accused person to prove anything, by statute or common law, that burden is only a slight one and that this burden can be discharged by the evidence of the witnesses for the prosecution as well as by the evidence for the defence."

After all, as Buhagiar J. himself said in *Saminathan*, the facts on which the defence rely are "proved, not by showing a mere possibility that such facts exist, but by showing the probability of their existence, the degree of probability being a matter of prudence in the circumstances of the case." This standard is clearly different from and appreciably lower than that required of the prosecution. The presumption under section 14, be it emphasised, is a rebuttable one and if the explanation offered is one which may very well be true, how can it be said that the case for the prosecution, at the close of the trial, has been proved beyond reasonable doubt? A proper evaluation of the evidence relied on by the defence is vastly different from the imposition of a distinctly heavier onus. If "proof" were held to imply satisfaction to the point of belief in the very existence of a fact, instead of belief in the reasonable probability of its existence, then there can be no practical difference between the quantum of proof required of the defence and that laid on the prosecution. We do not think that is the law.

To conclude, with special reference to the instant case, the finding of fact of the learned president was not merely that the explanation was "reasonable and probable", which would have sufficed, but that it was "probable and credible" as well as "compatible with the superior probability of his innocence." Clearly, therefore, his decision was right in law and ought to be reaffirmed in this court as it had been affirmed by Ali J.

Decision of the Sessions Court re-affirmed.

Solicitors: *S. Seenivasagam & Sons.*

SELANGOR OMNIBUS CO. LTD. v. TRANSPORT WORKERS' UNION, MALAYA & ORS.

[F.C. (Ong Hock Thye F.J., Raja Azlan Shah and Pawan Ahmad JJ.) February 20, 1968]

[K.L. — Federal Court Civil Appeal No. X. 12 of 1967]

Practice and Procedure — Certiorari — Discretionary order — Failure of party to raise objection at trial.

Practice and Procedure — Jurisdiction of tribunal — Failure to challenge — Whether disentitled appellant to apply out of time.

This was an appeal from the decision of Gill J. ([1967] 1 M.L.J. 280) dismissing an application for an order of *certiorari* to quash the proceedings and award of the Industrial Arbitration Tribunal. The appointment of members of the tribunal had expired on December 31, 1965, but no objection was taken by the appellants to the hearing of the dispute.

Held, dismissing the appeal: the jurisdiction of the tribunal was unquestioned for so long after it could have been challenged by the appellants. This disentitled the appellant from applying for an order of *certiorari* and as the remedy of *certiorari* was wholly discretionary, the court could refuse to make the order.

Cases referred to:—

(1) *Thomas* v. *Marconi's Wireless Telegraph Co. Ltd.* [1965] 1 W.L.R. 850, 852.

(2) *R.* v. *Williams & Ors. ex parte Phillips* [1914] 1 K.B. 608, 613, 614.

(3) *Chop Wong Soong Co.* v. *Khoo Hean Kee* [1964] M.L.J. 410.

FEDERAL COURT.

Ng Ek Teong (*Ponniah* with him) for the appellants.

J. Puthucheary for the 1st respondent.

Au Ah Wah (Senior Federal Counsel) for the 2nd and 3rd respondents.

Cur. Adv. Vult.

Ong Hock Thye F.J.: This is an appeal against the decision of Gill J. dismissing an application for an order of *certiorari* to remove into the High Court for the purpose of their being quashed the proceedings and award of the Industrial Arbitration Tribunal Case No. 1 of 1965, between Selangor Omnibus Company Limited and the Transport Workers' Union, Federation of Malaya*.

In a nutshell, the case for the appellants is that the tribunal was not lawfully constituted after December 31, 1965 and that, for this very reason its proceedings were conducted without any jurisdiction, rendering its award null and void.

This appeal raises the rather complex question of law whether the particular saving clause contained in a statutory instrument passed in substitution of and repealing earlier legislation has the effect of validating all things done in purported compliance with the provisions of the repealed legislation and to what extent.

It would *prima facie* appear that there are merits in the contention of counsel for the appellants. In my view the principle which may be said to apply is this: unless the acts done were of unimpeachable validity under the repealed law itself, the same cannot be validated simply because of the saving clause in the substituted law, which in the instant case reads:—

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* See [1967] 2 M.L.J. lii.

"Provided that all acts commenced or done under the regulations hereby repealed shall have effect for all purposes as if such acts had been commenced or done under the provisions of these regulations and as if these regulations had then been in force."

The question naturally arises, what if the acts commenced or done under the repealed regulations were not valid even under those regulations? It seems to me clear that such acts cannot be legalised *ex post facto*. Otherwise, the results will not only be unintended but absurd. The point in issue here, for instance, is whether the appointment of the members of the tribunal for a term expressly limited to expire on December 31, 1965 would not have lapsed automatically under the repealed regulations themselves so as to be impossible of revival. This and other related questions should be of great interest to explore at length but for the fact that, in my view, the effort will be no more than an academic exercise.

Unfortunately, there were omissions and oversight in more quarters than one, resulting in the points now raised having been overlooked all round. The point made by Mr. Puthucheary, counsel for the first respondent, is that, the relief applied for by *certiorari* being wholly discretionary, the appellants' own conduct throughout the whole course of the arbitration proceedings, and after, disentitles them to relief. Even where the objection was not taken by the respondents in the court below, they should not be precluded from doing so now. I consider this contention well founded, being the view of Willmer L.J. expressed in *Thomas* v. *Marconi's Wireless Telegraph Co. Ltd.*[1]

"On principle, I should have thought it plain that the position of a respondent, who is brought to this court on appeal against his will, is necessarily quite different from that of an appellant, who initiates the proceedings in this court. It is right that an appellant should be precluded from raising here for the first time a point not taken below. But it seems to me that there is no similar justification for shutting out a respondent who is brought here on appeal from taking any point in support of the judgment which he has obtained."

The tribunal sat for 10 months, conducted 32 hearings, of which 28 hearings, spread over 8 months, were held after the new regulations had come into force. At none of the hearings was any objection taken to the jurisdiction of the tribunal. After the award of June 24, 1966 the first respondent took the further step of applying to the tribunal for a variation of its award. It was, however, subsequently withdrawn when the secretary to the tribunal pointed out that it had no power to reverse its own decision. It was, of course, on that account that application was made to the High Court to quash the tribunal's award. It seems to me, therefore, that the jurisdiction of the tribunal remaining unquestioned for so long after it could have been is relevant in deciding whether or not to grant relief at this stage to the appellants. Authority for this view is to be found in *R.* v. *Williams & Ors., ex parte Phillips* [2] in which Channell J. said:—

"No objection was taken to the jurisdiction of the court below at the hearing before that court; that being so, it is the rule of this court not to grant a writ of *certiorari* except upon an affidavit which negatives knowledge on the part of the applicant when he was before the court below of the facts on which he bases his objection. That rule is established on good grounds. It applies equally whether the objection is on grounds which make the act of the justices voidable or void."

Later, he continued:—

"In my view the writ is discretionary. A party may by his conduct preclude himself from claiming the writ *ex debito justitiae* no matter whether the proceedings which he seeks to quash are void or voidable. If they are void it is true that no conduct of his will validate them; but such considerations do not affect the principles on which the court acts in granting or refusing the writ of *certiorari*. This special remedy will not be granted *ex debito justitiae* to a person who fails to state in his evidence on moving for the rule *nisi* that at the time of the proceedings impugned he was unaware of the facts on which he relies to impugn them. By failing so to do a party grieved precludes himself from the right to have the writ *ex debito justitiae* and reduces his position to that of one of the public having no particular interest in the matter. To such a one the granting of the writ is discretionary."

This decision was followed by this court in *Chop Wong Soong Co.* v. *Khoo Hean Kee* [3] where the appellant was held to have disentitled himself to leave to apply for an order of *certiorari* out of time, "because at the time he took no exception to what was done." Thus the principle which must guide the courts is clear and not to be lightly disregarded.

I would dismiss this appeal with costs.

Raja Azlan Shah and **Pawan Ahmad JJ.** concurred.

Appeal dismissed.

Solicitors: *Braddell & Ramani; Skrine & Co.*

ALAGAPPA CHETTIAR v. COLLECTOR OF LAND REVENUE, KUALA LUMPUR

[F.C. (Ong Hock Thye F.J., Raja Azlan Shah and Pawan Ahmad JJ.) February 20, 1968]

[K.L. — Federal Court Civil Appeal No. X. 24 of 1967]

Land Law — Compulsory acquisition — Market value of land — Price paid for acquired land at recent purchase — Not sole test — Sale of undivided share in land — Land Acquisition Act, 1960, ss. 4 & 38(5).

This was an appeal against the decision of Gill J. who had upheld on appeal the award of the collector of land revenue at $3 per square foot for the acquired land (*sub nom, Chuah Say Hai & Ors.* v. *Collector of Land Revenue, Kuala Lumpur* [1967] 2 M.L.J. 99). It appeared that in coming to his decision the learned judge relied on the fact that a half-share in the land had been sold for $2.20 per square foot seven months before the acquisition.